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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA**

PROTON ASSOCIATES LLC, and  
SETH MILLER,

Plaintiffs,

vs.

AVELO, INC.,

Defendant.

Case No.: 2:25-cv-00856-CDS-BNW

**PLAINTIFFS' OPPOSITION TO  
AVELO, INC.'S MOTION FOR A  
TEMPORARY RESTRAINING  
ORDER AND PRELIMINARY  
INJUNCTION**

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**PRELIMINARY STATEMENT**

Earlier this year, Defendant-Counterclaimant Avelo Airlines contracted with the Trump administration to facilitate its mass deportation efforts. Plaintiff and Counterclaim-Defendant Seth Miller exercised his First Amendment rights by starting the avelNO! public service campaign to criticize Avelo and make the public aware of Avelo's decision. But instead of taking Miller's criticism on the chin, Avelo now seeks a temporary restraining order and preliminary injunction to suppress the avelNO! public service campaign. The motions should be denied.

Legislators and the courts have carefully calibrated intellectual property law to account for Americans' right of free expression. But Avelo does not even acknowledge the correct legal framework for analyzing trademark infringement claims where the speech at issue is noncommercial and focused on criticizing the trademark holder. Instead, Avelo argues that Avelo (the airline) and avelNO! (the political speech campaign) are advertising similar services. *See* ECF No. 16 at 14. (ECF numbers 16 and 17 are identical.) That's preposterous: Miller is not an airline trying to use Avelo's mark to trick customers into buying tickets; he is an individual who disagrees with Avelo's decision to use its airplanes to deport people. Avelo and avelNO! do not compete in the marketplace. And, viewed through this lens, and aided by robust precedent, Miller's avelNO! campaign does not violate Avelo's intellectual property rights. The billboards and websites he set up to critique Avelo are within his First Amendment rights and do not violate either statute that Avelo asserts.

Avelo further fails to show that it will suffer irreparable injury absent an injunction, that the balance of hardships tips in its favor, or that an injunction stifling avelNO!'s criticism would be in the public interest. On these points, Avelo comes to the Court with a single shred of evidence, which indeed undermines its own case: it cites a Reddit post from a momentarily confused person who describes herself as "an

1 idiot” for ever believing that Avelo had anything to do with the billboard. Otherwise,  
 2 Avelo merely asserts, without support, that avelNO! is having an “unquantifiable  
 3 effect on Avelo’s business, reputation, and goodwill.” ECF No. 17 at 23. But attorney  
 4 argument is not evidence. Because Avelo can neither show a likelihood on the merits  
 5 nor a clear showing that it deserves an injunction, its motions should be denied.

## 6 BACKGROUND

### 7 A. Facts

8 Miller is an involved public citizen and an aviation enthusiast. He was raised  
 9 by a schoolteacher who taught him from a young age to contribute to his community,  
 10 and today Miller serves as a member of the New Hampshire House of  
 11 Representatives. Miller Decl. ¶ 3. For the past decade, Miller has worked as a  
 12 journalist and consultant covering the airline industry. *Id.* ¶ 2. His love of air travel  
 13 has taken him on over 1,900 flights serviced by more than 150 different airlines, and  
 14 he has logged more than 2 million miles of air travel to date. *Id.*

15 Miller became disturbed when he learned that Avelo chose to operate flights  
 16 that facilitate the Trump administration’s mass deportations. *Id.* ¶ 4. Miller is among  
 17 the many Americans who disagree with the Trump administration’s approach to  
 18 immigration. Moreover, as an aviation expert, Miller was especially concerned that  
 19 these deportation flights often involved shackling people below their seats, which  
 20 poses risks to them and those guarding them. *Id.*

21 So Miller decided to fight back against Avelo in the most American way  
 22 possible—he spoke out. Via the newly created “AvGeek Action Alliance” (“AvGeek” is  
 23 short for “aviation geek”), Miller began running the “avelNO!” public service  
 24 campaign to get the word out that Avelo is operating deportation flights. *Id.* ¶ 5. To  
 25 that end, he registered and began using the domain avelNO.com and leased three  
 26 billboards from Lamar Corporation. *Id.* ¶¶ 5, 9. The billboards looked like this:  
 27  
 28





*Id.* ¶ 10. Because Avelo is a small, lesser-known airline, Miller believes that a plain-text “Avelo” or “Avelo Airlines” will not capture the attention of drivers passing by on the highway or lead viewers to recognize that he is talking about a specific airline. *Id.* ¶¶ 7, 21. He thus designed the avelNO! campaign with a variant or parody of the Avelo mark and Avelo’s airplane livery—that is, the plane’s paint—to spread his message most effectively. *Id.* ¶¶ 5, 7, 21.

The avelNO! campaign also maintains and operates avelNO.com. *Id.* ¶ 9. Miller registered the avelNO.com domain name because that is the name of his public service campaign. *Id.* ¶ 11. The avelNO! website contains information about the campaign and a link where others may donate to it, with 100% of donated funds (less credit card transaction fees) going to the avelNO! campaign. *Id.* ¶ 12. The avelNO! campaign offers, sells, and markets no goods and provides no services to anyone. *Id.* ¶ 14. It exists purely to raise public awareness and engage in public discourse on this issue.

Avelo was apparently displeased when it learned of the campaign and sent Miller a cease-and-desist letter threatening him with suit for trademark infringement, unfair competition, dilution by tarnishment, and federal copyright



claims. *Id.* ¶ 15. Avelo warned that liability would lead to “three times AvGeek’s profits attributable to the infringement, . . . statutory damages of up to \$150,000 per infringement, [and] . . . the recovery of attorney’s fees and costs in exceptional cases like this.” Miller Decl., Ex. A at 3. Avelo also sent a letter to Lamar to complain about the billboards. Miller Decl., Ex. B.

### **B. This proceeding**

Rather than bow to Avelo’s demands, Miller filed a declaratory action in this Court. ECF No. 1. In the meantime, Lamar has refused to run the original billboard, so Miller is now still paying for the leased outdoor advertising space but using edited billboards that are designed differently and are less effective at spreading avelNO!’s message. Miller Decl. ¶¶ 16, 21. The revised billboards are:



*Id.* ¶ 17. After seeking an extension of time to respond to the original Complaint, Avelo on June 18, 2025, answered and responded with two counterclaims: a Lanham Act trademark infringement claim and an Anti-cybersquatting Consumer Protection Act claim. ECF No. 13. Only the trademark claim appeared in the demand letter; the cybersquatting claim is novel.

On June 24, 2025, nearly one week after it filed its answer and counterclaims, Avelo filed two materially identical motions, seeking to restrain Miller from displaying avelNO! billboards with Miller’s preferred design, “using the Avelo Marks . . . or any confusingly similar variations thereof,” “engaging in false or misleading advertising or commercial activities likely to deceive consumers into believing that Plaintiff is Avelo or that any of Plaintiffs’ services are associated or affiliated with,

connected to, approved by, or sponsored by Avelo,” and a court order requiring Dynadot Inc., a non-party, to lock the avelNO.com domain name. ECF No. 16 at 1-2.<sup>1</sup> Since the motions were filed, Avelo has supposedly abandoned the claims for unfair competition, dilution by tarnishment, and federal copyright violations with which it threatened Miller in the demand letter when Avelo realized these claims lack legal merit. *See* ECF No. 36. Nonetheless, Avelo persists in prosecuting the two claims at issue and has not withdrawn its motions seeking preliminary relief on them.

### LEGAL STANDARD

The Court analyzes the temporary restraining order and preliminary injunction requests under “identical” standards. *Lockheed Missile & Space Co. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). Both are “extraordinary and drastic remed[ies]” for which Avelo bears the burden to make “a clear showing” of success. *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012).

In particular, Avelo must make a clear showing that it “is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Every factor “must be satisfied,” or else this court should not issue relief. *Concord Music Grp., Inc. v. Anthropic PBC*, No. 24-cv-03811-EKL, 2025 WL 904333, at \*2 (N.D. Cal. Mar. 25, 2025). And under the Ninth Circuit’s sliding-scale approach, this Court may grant a preliminary relief if there is “less than ‘a likelihood of success’ on the merits” (but still “serious questions” on the merits) and “the balance of hardships tips *sharply*

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<sup>1</sup> On June 25, 2025, one day after Avelo filed its answer and counterclaims, Miller filed an amended complaint. ECF No. 21. That required Avelo to file a new answer and counterclaims, which it did on July 9, 2025. ECF No. 37. Avelo’s counterclaims are identical to those asserted on June 24, 2025. *Compare* ECF No. 13 *with* ECF No. 37. Accordingly, the parties agreed for efficiency purposes to treat the originally filed motions for a temporary restraining order and preliminary injunction to be based on the amended counterclaims.

in the plaintiff's favor' and the other two factors are satisfied." *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018) (quoting *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013)) (emphasis in original).

## ARGUMENT

Avelo cannot muzzle avelNO!'s criticism because it has no likelihood of success on either of its claims and has come to the Court without strong evidence of confusion, injury, or hardship. Both of Avelo's claims fail because avelNO! is a public service campaign focused on critiquing Avelo; it is not trying to sow marketplace confusion or profit from Avelo's marks. And, on the equitable factors, Avelo has submitted no evidence that it is being unfairly injured by the avelNO! campaign or that it is suffering hardship in any way. An injunction targeted at non-commercial speech is a drastic remedy, and Avelo's falls far short of meeting its burden.

### I. AVELO CANNOT ESTABLISH A LIKELIHOOD OF SUCCESS ON THE MERITS

Avelo cannot succeed on the merits of either its trademark infringement or cybersquatting claims. Although these claims are distinct, they fail for the same reason: Miller is not a competitor trying to confuse customers or profit from the Avelo mark. Instead, the avelNO! campaign is using an altered version of Avelo's mark to criticize the company. Because neither statute restricts one from using a mark to critique its owner, Avelo's motions are baseless, and this Court should deny them.

#### A. Avelo's Trademark Infringement Claims Fails as a Matter of Law

Avelo moves for preliminary relief on its infringement claim and asks this Court to enter an order that, among other things, bars Miller from putting up its preferred, effective billboard design. To "state a claim for trademark infringement under the Lanham Act, the plaintiff must show that (1) the plaintiff has a protectible

ownership interest in the mark, or for some claims, a registered mark; (2) the defendant used the mark ‘in connection with’ goods or services; and (3) that use is likely to cause confusion.” *LegalForce RAPC Worldwide, PC v. LegalForce, Inc.*, 124 F.4th 1122, 1125 (9th Cir. 2024) (quoting 15 U.S.C. § 1114(1)). Avelo makes no mention of the second element. *See* ECF No. 16 at 9–10. That is probably because Avelo knows that applying that factor would doom its case: Miller’s avelNO! campaign offers no “goods or services” under the Lanham Act, so Avelo’s trademark-infringement claim fails at the second step. And because avelNO! is a public service campaign that offers nothing for sale, Avelo similarly cannot show that the avelNO! campaign will confuse customers. Thus, Avelo cannot show any likelihood of success on the merits of its trademark infringement claim.

**1. avelNO! does not meet the Lanham Act’s commercial use requirement.**

Trademark “[i]nfringement claims are subject to a commercial use requirement.” *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676 (9th Cir. 2005). Specifically, the Lanham Act prohibits individuals from using another’s mark to sell, offer to sell, distribute, or advertise “goods or services.” 15 U.S.C. § 1114(1)(a). Accordingly, the statute “does not prohibit all unauthorized uses of a trademark.” *Bosley Med. Inst.*, 403 F.3d. at 679. Rather, “[t]he Supreme Court has made it clear that trademark infringement law prevents only unauthorized uses of a trademark in connection with a commercial transaction in which the trademark is being used to confuse potential consumers.” *Id.* at 676.

Avelo’s trademark claim fails as a matter of law because Miller is not selling anything, let alone “goods or services” within the meaning of the Lanham Act. Under the Act, a “good” is “a movable or tangible thing” and a “service” is the “performance of labor for the benefit of another.” *LegalForce RAPC Worldwide*, 124 F.4th at 1126. The avelNO! campaign offers nothing for sale and performs no service for anyone else;

1 it puts up billboards and maintains a website to get the word out that Avelo is helping  
2 the Trump administration deport people. Although the avelNO! campaign permits  
3 others to donate to it, the Ninth Circuit just last year rejected the notion that  
4 “trademark infringement can occur from fundraising activities where there has been  
5 no sale of a good or a service.” *Id.*

6 A host of cases—all of which Avelo notably fails to cite, much less discuss—  
7 establish that avelNO! cannot be subject to a Lanham Act claim. In *Bosley Medical*  
8 *Institute*, for instance, the Ninth Circuit held that an aggrieved person who set up a  
9 website to complain about Bosley’s hair therapy could not be liable for infringement  
10 because his website existed only to criticize Bosley rather than to sell anything. *See*  
11 403 F.3d at 677–79 (“Kremer is not Bosley’s competitor; he is their critic. His use of  
12 the Bosley mark is not in connection with a sale of goods or services—it is in  
13 connection with the expression of his opinion about Bosley’s goods and services.”).  
14 Similarly, in *Aviva USA Corp. v. Vazirani*, the Ninth Circuit affirmed the District of  
15 Arizona’s finding that a non-commercial website meant to criticize a trademark  
16 holder cannot be the subject of a Lanham Act claim. 902 F. Supp. 2d 1246, 1263 (D.  
17 Ariz. 2012), *aff’d*, 632 F. App’x 885 (9th Cir. 2015). There, Vazirani set up a website,  
18 “Aviva Uncovered,” to criticize Aviva’s business practices. The district court granted  
19 summary judgment to Vazirani because the website was noncommercial. 902 F. Supp.  
20 2d at 1259. Thus, “[a]ny harm to [Aviva] arises not from a competitor’s sale of a  
21 similar product under [Aviva’s] mark, but from [Defendants’] criticism of [Aviva].” *Id.*  
22 (alterations in original). Because that critical speech was not commercial, there could  
23 be no trademark-infringement claim.

24 Critically, the Lanham Act’s commercial speech requirement is necessary  
25 because applying the statute against the avelNO! public interest campaign would be  
26 impermissible under the First Amendment. Miller is engaging in noncommercial  
27 political speech, which “[a]s a matter of First Amendment law,” may not be regulated  
28

1 like commercial speech. *Bosley Medical Inst.*, 403 F.3d at 677 (citing *Florida Bar v.*  
 2 *Went For It, Inc.*, 515 U.S. 618, 623 (1995)). Thus, the First Amendment “offer[s] little  
 3 protection for a competitor who labels its commercial good with a confusingly similar  
 4 mark, but ‘[t]rademark rights do not entitle the owner to quash an unauthorized use  
 5 of the mark by another who is communicating ideas or expressing points of view.’”  
 6 *Mattel, Inc. v. MCA Recs., Inc.*, 296 F.3d 894, 900 (9th Cir. 2002) (quoting *L.L. Bean,*  
 7 *Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 29 (1st Cir. 1987)).

8 Here, there is no non-frivolous argument that Miller is engaging in commercial  
 9 speech with his billboards and website that attempt to sell nothing at all, and Avelo  
 10 makes no argument on this point. “[T]he test for identifying commercial speech’ is  
 11 whether the advertisement ‘propose[s] a commercial transaction.’” *Child. of the*  
 12 *Rosary v. City of Phoenix*, 154 F.3d 972, 983 (9th Cir. 1998) (quoting *Board of Trustees*  
 13 *of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989)). In prosecuting its  
 14 cybersquatting claim, Avelo appears to concede that the avelNO! campaign is  
 15 noncommercial, although it contends without elaboration that its noncommercial use  
 16 is not “*bona fide*.” ECF No. 16 at 19. But Avelo does not explain the difference between  
 17 “*bona fide*” and “non-*bona fide*” noncommercial uses, and in fact it is clear that  
 18 avelNO! is engaging in the paradigmatic noncommercial speech at the core of the  
 19 First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (“Discussion of public  
 20 issues . . . are integral to the operation of the system of government established by  
 21 our Constitution. The First Amendment affords the broadest protection to such  
 22 political expression in order ‘to assure (the) unfettered interchange of ideas for the  
 23 bringing about of political and social changes desired by the people.’” (quoting *Roth*  
 24 *v. United States*, 354 U.S. 476, 484 (1957))); *Dun & Bradstreet, Inc. v. Greenmoss*  
 25 *Builders, Inc.*, 472 U.S. 749, 758–759 (1985) (opinion of Powell, J.) (“[S]peech on  
 26 ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection.’”  
 27 (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978))). Ultimately,  
 28



1 because the avelNO! campaign is noncommercial, Avelo cannot use the Lanham Act  
 2 “either as a shield from [Miller’s] criticism, or as a sword to shut [Miller] up.” *Bosley*  
 3 *Medical Inst.*, 403 F.3d at 680.

4 **2. Avelo has not shown any likelihood of confusion.**

5 The fact that Miller’s use of Avelo’s mark is for noncommercial speech on a  
 6 matter of public concern means that Avelo has no claim under the Lanham Act and  
 7 no likelihood of success. But even assuming that this Court examines other elements  
 8 of the claim, Avelo also cannot establish the third element, likelihood of confusion,  
 9 because there is no risk that avelNO!’s public interest campaign will cause confused  
 10 airplane customers to mistakenly buy goods or airline services from avelNO! or any  
 11 other competitor. “The Lanham Act seeks to prevent consumer confusion that enables  
 12 a seller to pass off his goods as the goods of another . . . . [T]rademark infringement  
 13 protects only against mistaken *purchasing decisions* and not against confusion  
 14 generally.” *Id.* at 677 (quoting *Lang v. Ret. Living Publ’g Co., Inc.*, 949 F.2d 576, 582–  
 15 83 (2d Cir. 1991)) (emphasis in original). Thus, “[t]he test for likelihood of confusion  
 16 is whether a ‘*reasonably prudent consumer*’ in the marketplace is likely to be confused  
 17 as to the origin of the good or service bearing one of the marks.” *Dreamwerks Prod.*  
 18 *Grp., Inc. v. SKG Studio*, 142 F.3d 1127, 1129 (9th Cir. 1998). But avelNO! does not  
 19 sell anything, let alone “goods or services” under the Lanham Act. So there is no risk  
 20 that the avelNO! campaign could deceive a customer into buying an avelNO! flight  
 21 ticket rather than an Avelo ticket.

22 Amazingly, Avelo argues that it and avelNO! are competitors because both  
 23 “provide information in the field of airline transportation.” ECF No. 16 at 14–15. That  
 24 is absurd. Avelo operates a passenger airline, and avelNO!’s sole mission is to publicly  
 25 criticize Avelo. Under Avelo’s logic, Tyson Foods competes with PETA because both  
 26 provide information about meat products. That is self-evidently incorrect. Neither  
 27 avelNO!’s billboards nor its website provide anything commercial, let alone flight  
 28



1 tickets, and avelNO! does not compete with Avelo. *See Bosley Medical Inst.*, 403 F.3d  
 2 at 677–79 (“Kremer is not Bosley’s competitor; he is their critic”).

3 **3. avelNO! makes fair use of elements of Avelo’s mark.**

4 Given the absurd outcome that Avelo wishes to reach, it is no surprise that  
 5 Avelo analyzed the “likelihood of confusion” element under the incorrect framework.  
 6 While courts in this Circuit typically analyze eight factors, known as the “*Sleekcraft*  
 7 factors,’ to assess whether a use of a mark is likely to cause confusion,” *Aviva*, 902 F.  
 8 Supp. 2d at 1263, the Ninth Circuit “has articulated a different test for cases  
 9 involving nominative use of a trademark, which occurs when [an alleged infringer]  
 10 uses a [holder’s] mark to refer to the [holder’s] products, rather than to the [alleged  
 11 infringer]’s own products,” *id.* (citing *New Kids on the Block v. News Am. Pub., Inc.*,  
 12 971 F.2d 302, 308 (9th Cir. 1992)). That alternative analysis, often referred to as a  
 13 “nominative fair use defense,” applies here because avelNO! used a variant of Avelo’s  
 14 mark “to refer to [Avelo] and its products and services rather than [avelNO!] and their  
 15 products and services,” since avelNO! offers no products or services. *Id.* at 1264. This  
 16 makes sense because avelNO!’s “entire purpose is to criticize [Avelo] and its products,  
 17 which typically necessitates the nominal use of the criticized party’s mark.” *Id.*

18 Pursuant to that test (which applies by its terms to commercial users, and so,  
 19 if the outcome were close, would be applied in a manner that is even more solicitous  
 20 to the free speech of a noncommercial user like Miller):

21 [A] commercial user is entitled to a nominative fair use  
 22 defense provided he meets the following three  
 23 requirements: First, the product or service in question  
 24 must be one not readily identifiable without use of the  
 25 trademark; second, only so much of the mark or marks may  
 26 be used as is reasonably necessary to identify the product  
 27 or service; and third, the user must do nothing that would,  
 28 in conjunction with the mark, suggest sponsorship or  
 endorsement by the trademark holder.

*New Kids on the Block*, 971 F.2d at 308. Here, those three factors point to a fair use defense as a matter of law. “The first factor is easily met, for there is no clear way for [avelNO!] to convey their criticism for a specific entity, [Avelo], without naming that specific entity.” *Aviva USA Corp.*, 902 F. Supp. 2d at 1264. The second element is also satisfied because “the stylized logo and distinctive coloring were not used in a commercial or competitive manner, but rather were used solely to identify [Avelo] as the object of [avelNO!’s] criticism. Further, [avelNO!] embedded [its] own critical commentary within the logo” by adding a prominent “n” before the “l” and “o” in Avelo, so that the mark reads “avelNo!” *Id.* at 1265. Using this same logic, the district court in *Aviva* denied the trademark infringement claim of a plaintiff with this mark:



Who complained about this website:



*Id.* at 1252. That court explained that “[t]he purpose of the nominative fair use test is ‘to address the risk that nominative use of the mark will inspire a mistaken belief on the part of consumers that the speaker is sponsored or endorsed by the trademark holder.’” *Id.* at 1265 (quoting *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1176 (9th Cir. 2010)). Given how avelNO! altered the Avelo mark and “the very obvious negative commentary directed towards [Avelo],” there is similarly no reasonable risk of the confusion that the fair use tests for. *Id.* And the third element is met because avelNO!’s “entire [campaign] is concerned with criticizing Aviva and its business practices,” so there is no risk that a reasonable person would think Avelo endorses avelNO! *Id.* at 1264. Moreover, the billboard and website both state that

they are paid for by AvGeek Action Alliance, not Avelo. Miller Decl. ¶ 10. Nominative fair use is available here, and not only requires that the Court find that Avelo has no likelihood of success but that Miller should prevail as a matter of law, which relief Plaintiffs will request via an appropriate motion at the appropriate stage of litigation.

#### 4. Avelo loses even if the *Sleekcraft* factors apply.

Even if the *Sleekcraft* factors apply, they point against a likelihood of confusion. The *Sleekcraft* test “is pliant. Some factors are much more important than others, and the relative importance of each individual factor will be case-specific.” *Brookfield Comms., Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1054 (9th Cir. 1999). Moreover, “trademark infringement protects only against mistaken purchasing decisions and not against confusion generally.” *Bosley Medical Inst.*, 403 F.3d at 677. Here, Avelo and avelNO! do not offer related goods or services, so Avelo cannot possibly prove that consumers have been confused about purchasing decisions. *See Brookfield Comms.*, 174 F.3d at 1056 (there is only a “remote” likelihood of confusion when parties “[do] not compete to any extent”).

The meager evidence Avelo proffers of actual confusion, factor five, is comically self-defeating. Avelo submits only a thread of users discussing the billboard on Reddit in the subreddit “r/Connecticut,” which is a place where users go to discuss things related to, or occurring in, that state. The thread begins with a post from a user identified as “Barbiebrattt,” who drove by one of the billboards, posted that she saw a billboard “by Avelo saying ‘does your vacation support their deportation?’” and then asked “wtf does that mean???” Myers Decl. ¶ 12 & Ex. A. An online discussion ensued about the issue of Avelo’s deportation flights. *Id.* Then Barbiebrattt returned to the same forum and posted a picture of the billboard with a note that she was “an idiot” for not understanding the billboard immediately. *Id.* Rather, she explained that as soon as she saw the billboard she “knew something was off,” and that the billboard is “[d]efinitely a protest.” Myers Decl. ¶ 12 & Ex. A. And that is it: one thread with

1 someone who referred to herself as an “idiot” for ever being confused is Avelo’s *sole*  
2 *evidence* in the record of alleged actual consumer confusion.

3 This is woefully insufficient to prove a likelihood of success. *See Aviva USA*  
4 *Corp.*, 902 F. Supp. 2d at 1267 (“Such fleeting confusion is not sufficient to establish  
5 a likelihood of confusion.”) Courts judge likelihood of confusion from the perspective  
6 of a “reasonably prudent consumer.” *Dreamwerks*, 142 F.3d at 1129. But Avelo’s sole  
7 piece of evidence comes from someone who was neither a consumer nor, by her own  
8 admission, reasonably prudent. Plaintiffs have not found in the Federal Reporter a  
9 court that relied on the temporary confusion of a self-professed “idiot” to find there  
10 was evidence of actual confusion, and this Court should not issue the first opinion so  
11 holding. Moreover, there is nothing in the record to suggest, and Avelo does not argue,  
12 that the Reddit user is an Avelo or airline consumer.

13 Other factors also point against a likelihood of confusion. For instance, on  
14 factor six, which tests the degree of consumer care, consumers are likely to be more  
15 discerning when buying expensive goods like flight tickets, so even momentary  
16 confusion is insufficient because consumers will scrutinize a purchase more closely  
17 when it comes time to purchase. *See Brookfield Comms.*, 174 F.3d at 1060. Factor  
18 eight, likelihood of expansion, favors Miller because Avelo has introduced no evidence  
19 that it intends to expand and avelNO! is hindering its ability to do so. *See Survivor*  
20 *Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 634 (9th Cir. 2005). Moreover, because  
21 avelNO! does not offer any goods or services, there is no evidence of overlap in the  
22 parties’ marketing channels, so factor five favors Miller. *See id.* at 633 (asking  
23 “whether the parties distribute their goods in the same marketing channels”).  
24 Finally, factor seven, which tests Miller’s intent in creating avelNO!’s branding,  
25 favors Miller because he designed the avelNO! campaign to be maximally effective in  
26 letting the public know that Avelo is operating deportation flights. *See Entrepreneur*  
27  
28

1 *Media, Inc. v. Smith*, 279 F.3d 1135, 1148 (9th Cir. 2002) (asking whether the  
2 defendant had the “intent to deceive”).

3 All told, even if the Court engages in the *Sleekcraft* analysis (which it need  
4 not), the balance of these factors point to the fact that the avelNO! campaign is  
5 unlikely to confuse customers purchasing plane tickets. After all, it is impossible that  
6 anyone would see the avelNO! campaign and somehow end up buying the wrong  
7 airline ticket from the wrong company. avelNO! does not sell airline tickets. Because  
8 that is *Sleekcraft*’s primary concern, Avelo loses.

### 9 **B. Miller Lacks the Requisite Intent to be a Cybersquatter**

10 Avelo also moves for preliminary relief on its cybersquatting claim, asking this  
11 Court to order the third-party Dynadot to lock the avelNO.com domain name and also  
12 to enter an order barring Miller from using avelNO.com. But just as Avelo failed even  
13 to mention a crucial element of its trademark infringement claim—the requirement  
14 that avelNO! provide “goods or services”—Avelo ignores a critical aspect of its  
15 cybersquatting claim. To be liable as a cybersquatter, Miller must have a “bad faith  
16 intent *to profit from [Avelo’s] mark.*” 15 U.S.C. § 1125(d)(1)(A)(i) (emphasis added).  
17 Because avelNO! has done so such thing, the claim will fail as a matter of law, and  
18 Avelo cannot obtain preliminary relief.

19 The Anti-cybersquatting Consumer Protection Act (“ACPA”), codified at 15  
20 U.S.C. § 1125(d), allows a holder of a mark to sue those who “register[], traffic[] in, or  
21 use[] a domain name that . . . is identical or confusingly similar to that mark” and  
22 have “a bad faith intent to profit from that mark.” 15 U.S.C. § 1125(d)(1)(A).  
23 Critically, the ACPA is a specific-intent statute. To be liable as a cybersquatter, “the  
24 defendant must intend to profit specifically from the goodwill associated with  
25 another’s trademark.” *Solid Host, NL v. Namecheap, Inc.*, 652 F. Supp. 2d 1092, 1109  
26 (C.D. Cal. 2009); *see also Blair v. Automobili Lamborghini SpA*, 754 F. Supp. 3d 849,  
27 856 (D. Ariz. 2024) (“The crucial elements of bad faith intent to profit . . . are distilled  
28

1 to mean an ‘intent to trade on the goodwill of another’s mark.’”) (quoting *Lucas*  
 2 *Nursery & Landscaping, Inc. v. Grosse*, 359 F.3d 806, 810 (6th Cir. 2004)). Avelo never  
 3 explains how Miller intended to profit from Avelo’s mark, and for that reason it  
 4 cannot carry its burden. And the reality is that Avelo cannot state a cybersquatting  
 5 claim as a matter of law because the avelNO! campaign is a good-faith effort to raise  
 6 awareness about Avelo’s cooperation with the Trump administration to facilitate  
 7 mass deportations, rather than a bad-faith scheme to profit from Avelo’s mark. As a  
 8 result, Avelo cannot show a likelihood of success on its cybersquatting claim.

9 The ACPA lists nine non-exhaustive factors to guide the analysis of whether  
 10 one acted with a bad faith intent to profit from another’s mark. See 15 U.S.C.  
 11 § 1125(b)(i). “These factors attempt ‘to balance the property interests of trademark  
 12 owners with the legitimate interests of Internet users and others who seek to make  
 13 lawful uses of other’s marks, including for purposes such as comparative advertising,  
 14 *comment, criticism*, parody, news reporting, fair use, etc.” *Lamparello v. Falwell*, 420  
 15 F.3d 309, 319 (4th Cir. 2005) (quoting H.R.Rep. No. 106–412, 1999 WL 970519, at  
 16 \*10) (emphasis in *Lamparello*). Importantly, these “factors are given to courts as a  
 17 guide, not as a substitute for careful thinking about whether the conduct at issue is  
 18 motivated by a bad faith intent to profit.” *Lucas Nursery & Landscaping*, 359 F.3d at  
 19 811.

20 “The first four factors are those that militate against a finding of bad faith by  
 21 providing some reasonable basis for why a defendant might have registered the  
 22 domain name of another mark holder.” *Id.* at 809. These factors are:

23 *The trademark or other intellectual property rights of the person, if any, in the*  
 24 *domain name.* This factor favors Miller because he registered avelNO.com to bring  
 25 attention to his avelNO! campaign. Critically, this inquiry focuses on Miller’s “rights  
 26 . . . in the domain name,” not whether Miller has rights in the defendant’s marks. 15  
 27 U.S.C. § 1125(b)(i)(I). Yet Avelo argues that this factor weighs in its favor because  
 28



1 Miller has no rights to the Avelo mark. *See* ECF No. 16 at 18 (“Absent any rights in  
 2 the AVELO mark, this factor weighs in Avelo’s favor”). Under the proper inquiry,  
 3 Miller has intellectual property rights in the domain name avelNO because that is  
 4 the name of the public service campaign he started, and one that has acquired  
 5 secondary meaning. *See Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1354  
 6 (9th Cir. 1985) (one can acquire intellectual property rights in a mark if there is a  
 7 “mental association by a substantial segment of consumers and potential consumers  
 8 “between the alleged mark and a single source of the product.” (citation omitted)).

9 *The extent to which the domain name consists of the legal name of the person*  
 10 *or a name that is otherwise commonly used to identify that person.* The second factor  
 11 also favors Miller. The avelNO.com domain name partially contains “Avelo” because  
 12 Miller made the avelNO! campaign to criticize Avelo. In *Lamparello*, the Fourth  
 13 Circuit ruled that the “fallwell.com” website used to criticize Jerry Falwell’s views did  
 14 not constitute cybersquatting, despite the fact that the domain name contained  
 15 “Falwell,” because the defendant “used www.fallwell.com to engage in the type of  
 16 ‘comment and criticism’ that Congress specifically stated militates against a finding  
 17 of bad faith intent to profit.” 420 F.3d at 321. The same logic holds here.

18 *The person’s prior use, if any, of the domain name in connection with the bona*  
 19 *fide offering of any goods or services.* This factor favors Miller even though he recently  
 20 registered the avelNO.com domain. Miller did not use avelNO.com prior to Avelo  
 21 operating deportation flights because he registered the domain name to criticize  
 22 Avelo’s decision to operate deportation flights. Avelo’s argument that Miller’s recent  
 23 registration means this factor favors it wholly ignores the goal of the analysis—to test  
 24 whether the registrant had a bad faith intent to profit from another’s mark. Ignoring  
 25 the fact that avelNO! offers no “goods or services,” Miller registered the avelNO.com  
 26 domain name specifically to advertise the avelNO! campaign, not to profit from  
 27 Avelo’s mark.



1        *The person’s bona fide noncommercial or fair use of the mark in a site accessible*  
 2 *under the domain name.* This factor straightforwardly favors Miller because he is  
 3 using the avelNO.com site to criticize Avelo in a noncommercial fashion. As it must,  
 4 and as is fatal to its trademark infringement claim, Avelo implicitly concedes  
 5 avelNO.com is not commercial. *See* ECF No. 16 at 19 (never contesting that avelNO!  
 6 is noncommercial). But it insists that Miller’s use is not “*bona fide*” because the  
 7 avelNO.com domain name is confusingly similar to Avelo’s name. *See id.* That  
 8 argument did not work when Jerry Falwell challenged “fallwell.com,” 420 F.3d at 321,  
 9 it did not work when Lucas Nursery sued a consumer who registered the name  
 10 “lucasnursery.com” to complain about the nursery, *Lucas Nursery & Landscaping*,  
 11 359 F.3d at 809, and the argument should be similarly rejected here. Moreover, the  
 12 fact that Miller “believed and had reasonable grounds to believe that the use of the  
 13 domain name was a fair use or otherwise lawful” brings this case within the ACPA’s  
 14 safe harbor provision. 15 U.S.C. § 1125(d)(b)(ii); *see Acad. of Motion Picture Arts &*  
 15 *Scis. v. GoDaddy.com, Inc.*, 2015 WL 5311085, at \*50 (C.D. Cal. Sept. 10, 2015)  
 16 (defendant who held an “objective good faith belief” that its actions were lawful is  
 17 shielded by the ACPA’s safe harbor provision).

18        *Factors 5–8.* “Factors five through eight are indicative of the presence of bad  
 19 faith on the part of the defendant.” *Id.* To its credit, Avelo concedes that factors six  
 20 through eight do not favor its claim, admitting that “there is no evidence that  
 21 Plaintiffs offered to sell the domain name after registering it, provided false contact  
 22 information when registering it, or is engaged in a pattern of registering multiple  
 23 domain names containing others’ trademarks.” ECF No. 16 at 18 n.8. Avelo  
 24 disingenuously argues that this renders these factors “inapplicable or neutral.” *Id.*  
 25 That is decidedly not so—it is Avelo’s burden to show that Miller registered  
 26 avelNO.com with the bad faith intent to profit from Avelo’s mark, and that these  
 27 factors show no such intent cuts strongly against Avelo’s claim that Miller registered  
 28

1 avelNO.com in bad faith. *See Pac. Portland Cement Co. v. Food Mach. & Chem. Corp.*,  
2 178 F.2d 541, 547 (9th Cir. 1949) (“It is a fundamental rule that the burden of proof  
3 in its primary sense rests upon the party who, as determined by the pleadings, asserts  
4 the affirmative of an issue and it remains there until the termination of the action. It  
5 is generally upon the party who will be defeated if no evidence relating to the issue is  
6 given on either side”).

7 The only factor of the latter four that Avelo contests is the fifth factor, which  
8 looks to the registrant’s “intent to divert customers . . . either for commercial gain or  
9 with the intent to tarnish or disparage the mark by creating a likelihood of confusion  
10 *as to the source, sponsorship, affiliation, or endorsement of the site.*” 15 U.S.C. §  
11 1125(b)(i)(VIII) (emphasis added). Avelo argues, without submitting a shred of  
12 evidence, that this factor is satisfied because the avelNO.com domain name is similar  
13 to Avelo’s mark. *See* ECF No. 16 at 19-20. It cites a single case in support that could  
14 not be any different than the case at hand. There, an unknown registrant sought to  
15 divert MGM customers by registering “imgmcasino.com,” using the MGM mark on  
16 the website, and offering online casino services on the site. *See MGM Resorts Int’l v.*  
17 *Unknown Registrant of www.imgmcasino.com*, No. 2:14-CV-1613-GMN-VCF, 2015  
18 WL 5674374, at \*1 (D. Nev. July 8, 2015) (subsequent history omitted). But there is  
19 no plausible argument that avelNO! is trying to divert customers or offer competing  
20 airline services. The avelNO! website offers no flight tickets and does not copy Avelo’s  
21 mark—it brings awareness to Avelo’s role in deporting people. Thus, no reasonable  
22 customer could be diverted or confused about the source, sponsorship, affiliation, or  
23 endorsement of the site.

24 \* \* \*

25 All told, the multifactor test establishes that Avelo has no likelihood of  
26 confusion on its cybersquatting claim, and Plaintiffs engaged in no bad faith conduct.  
27 Echoing the *Aviva* court that rejected a similar cybersquatting claim as the one now  
28

1 before this Court, the avelNO! website is “not commercial, it was used only to criticize  
 2 [Avelo], and [Miller] never made any attempt to sell the domain names for profit.”  
 3 902 F. Supp. 2d at 1268. Thus, Miller’s registration and use of the site “do not fall  
 4 within the scope of the ACPA.” *Id.*

## 5 **II. AVELO IS NOT SUFFERING ANY IRREPARABLE INJURY**

6 Avelo has no likelihood of success on either claim, but it loses on the equitable  
 7 factors too. Avelo offers no actual evidence it is suffering and will suffer further  
 8 irreparable injury absent an injunction. Beyond attorney argument, Avelo mostly  
 9 rests on a rebuttable presumption owing to Lanham Act plaintiffs that show a  
 10 likelihood of success on the merits. *See* ECF No. 16 at 20-22. But Avelo failed to  
 11 establish any likelihood of success on either of its claims—indeed, it fails to state  
 12 either claim as a matter of law—so Avelo enjoys no presumption it is suffering  
 13 irreparable injury that necessitates an injunction.

14 But even if Avelo had such a presumption, the dearth of evidence in its favor  
 15 rebuts it. Companies can establish irreparable injury by showing harm to their  
 16 business reputation, diminished sales, likelihood of future harm, and continued sales  
 17 or manufacturing of the infringing products. *See MGA Ent. Inc. v. Harris*, No. 2:20-  
 18 cv-11548, 2025 WL 1416045, at \*5-6 (C.D. Cal. Apr. 15, 2025). But though Avelo  
 19 gestures at the “irreparable harm to its goodwill and reputation as a result” of the  
 20 avelNO! campaign, it has no evidence to support its claim. ECF No. 16 at 22. Its sole  
 21 piece of evidence is the aforementioned Reddit thread with *one* curious individual  
 22 who cleared up her question days later, and admitted to “[knowing] something was  
 23 off” the whole time, and who helpfully described her initial reaction as that  
 24 attributable to “an idiot.” Myers Decl. ¶ 12 & Ex. A. Besides that, Avelo provides  
 25 attorney argument that avelNO!’s campaign has “had and will continue to have an  
 26 unquantifiable effect on Avelo’s business, reputation, and goodwill.” ECF No. 16 at  
 27 23. The effect that avelNO!’s billboards and website are having on Avelo’s business is  
 28

1 certainly unquantifiable, but that is because Avelo submitted no evidence on this  
2 point. Ultimately, attorney argument is not evidence, and the absence of evidence  
3 that Avelo is injured militates against its extraordinary ask for an injunction to quash  
4 criticism against it.

5 Of course, the absence of evidence on this point makes perfect sense—avelNO!  
6 is not a marketplace competitor diverting sales from Avelo. To be sure, the Reddit  
7 posts that Avelo put into the record contain plenty of evidence that consumers are  
8 souring on Avelo. But that Reddit post shows anger at Avelo because consumers are  
9 learning that Avelo provides planes to help the Trump administration deport people.  
10 That shows that avelNO!’s campaign is working as intended, not that people are  
11 confused about whether avelNO! offers flight tickets or whether Avelo is running a  
12 public service campaign against itself. *See New Kids on the Block*, 971 F.2d at 308–  
13 09 (using a mark to solicit criticism of the markholder does not suggest the  
14 markholder is sponsoring use of the mark); *Lamparello*, 420 F.3d at 315 (“No one  
15 would believe that Reverend Falwell sponsored a site criticizing himself, his positions,  
16 and his interpretations of the Bible”).

17 Finally, it is worth noting that Avelo asks this court for an injunction that  
18 would cause irreparable harm to Miller. The avelNO! campaign is engaged in  
19 noncommercial speech protected under the First Amendment. It “is well established  
20 that the deprivation of constitutional rights unquestionably constitutes irreparable  
21 injury.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (cleaned up). And  
22 “[t]he loss of First Amendment freedoms, for even minimal periods of time,  
23 unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373  
24 (1976). Thus, in seeking to muzzle Miller, Avelo asks this court to cause irreparable  
25 injury to him. It should decline the invitation.

### III. THE BALANCE OF HARDSHIPS LEANS IN MILLER’S FAVOR

To test the balance of hardships, a court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987). Avelo bears the burden of showing it will suffer more hardship absent an injunction than Miller will suffer if avelNO!’s speech is enjoined. *See Innovativ Media Grp., Inc. v. Beys*, No. 2:22-cv-01362, 2022 WL 3701579, at \*5 (D. Nev. Aug. 26, 2022).

Avelo falls well short of meeting its burden because it makes no specific allegations of the injury it would suffer absent an injunction. “A party seeking to tip the balance of hardships must go beyond mere allegations and actually demonstrate that a particular harm is imminent.” *Save Our Summers v. Washington State Dep’t of Ecology*, 132 F. Supp. 2d 896, 908 (E.D. Wash. 1999); *see also Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980) (describing “the requirement that some balance of hardships favoring that party be established by the record”). But rather than show the specific harms it will suffer without a court-issued injunction, Avelo gestures to the fact that avelNO! will “have an unquantifiable effect on Avelo’s business, reputation, and goodwill.” ECF No. 16 at 23. If the court is to balance hardships, Avelo must make record evidence of the harms it would suffer so the court can measure and balance the hardships. Instead, Avelo comes with empty hands and attorney argument that it is suffering “unquantifiable” hardships. That does not suffice.

But the Court need not guess at the harm Miller would suffer if Avelo’s requested injunction issues. Above all else, an injunction would impinge Miller’s First Amendment rights. Although Avelo states *it* is fine with the revised billboard, “the Constitution leaves matters of taste and style so largely to the individual,” and an injunction would rob Miller of his First Amendment right to design his billboard and website as he pleases. *Cohen v. California*, 403 U.S. 15, 25 (1971); *see also United*

1 *States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) (“[E]sthetic and  
 2 moral judgments about art and literature . . . are for the individual to make, not for  
 3 the Government to decree.”). Moreover, the new billboards with the plain-text “Avelo”  
 4 frustrate avelNO!’s ability to spread its message effectively. Miller Decl. ¶¶ 5, 7, 21.  
 5 Accordingly, an injunction would violate Miller’s First Amendment rights and  
 6 impinge avelNO!’s ability to spread its message to as many people as possible.

#### 7 **IV. AN INJUNCTION IS DECIDEDLY AGAINST THE PUBLIC INTEREST**

8 “In the trademark context, courts often define the public interest as the right  
 9 of the public not to be deceived or confused.” *Maxim Integrated Prods., Inc. v.*  
 10 *Quintana*, 654 F. Supp. 2d 1024, 1036 (N.D. Cal. 2009). As explained at length, Avelo  
 11 has shown no evidence that a single person, let alone any airline customer, is confused  
 12 by the avelNO! campaign. And that makes perfect sense: it is not likely that Avelo  
 13 would run a public service campaign against itself. Because the public has no risk of  
 14 getting confused about the source of the avelNO! campaign, an injunction would not  
 15 serve the public interest.

16 Moreover, “the public interest favors the exercise of First Amendment rights.”  
 17 *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014). An injunction would impair the  
 18 ability for avelNO! to disseminate its message effectively. *Id.* ¶¶ 5, 7, 21. Accordingly,  
 19 it would be against the public interest for this Court should issue the request that  
 20 Avelo seeks.

21 \* \* \*

22 The Court should reject Avelo’s request to stifle avelNO!’s political speech.  
 23 Avelo’s claims fail because avelNO! is running a noncommercial campaign aimed at  
 24 criticizing Avelo. But rather than confront the controlling law, Avelo avoids citing to  
 25 or acknowledging basic elements of its own claims when doing so reveals their obvious  
 26 weaknesses. Avelo fares little better on the equitable factors, as it musters only a  
 27 single piece of self-defeating evidence. For Avelo, this lawsuit hardly seems to be  
 28

1 about the law—it is instead a brazen attempt by an airline company to bully a private  
2 citizen into silence. The Court should deny Avelo’s motions and reject its attempt to  
3 silence its critics while this litigation continues.

4 **CONCLUSION**

5 For the above reasons, Plaintiff Seth Miller and Proton Associates LLC  
6 respectfully request this Court denies Avelo’s requests for a temporary restraining  
7 order and preliminary injunction.

8  
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